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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 1[redacted]192

WILLIAM SESSOMS,

Petitioner,

v.

THE UNION SAVINGS AND TRUST COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

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No. 1219.

WILLIAM SESSOMS,

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v.

THE UNION SAVINGS AND TRUST COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

For simplicity Sessoms, petitioner here and plaintiff in the District Court, will be referred to as petitioner or as Sessoms. The Union Savings and Trust Company, respondent here and defendant in the District Court, will be referred to as respondent.

OPINIONS OF THE COURT OF APPEALS.

There is no District Court opinion. The opinion of the Court of Appeals for the Sixth Circuit (Appendix of Petition, p. 15, hereafter referred to as "Appendix") is reported at 338 F. 2d 752. The opinion of the Court of Appeals for the Sixth Circuit denying petition for rehearing (Appendix p. 28) is reported at 342 F. 2d 751.

QUESTION PRESENTED.

Whether the erroneous and prejudicial error of the trial court in refusing to charge that guilt was a defense and in charging that guilt was not an issue in the case, to which errors exception was taken, was rendered harmless by the submission of the interrogatory asking if the check was cashed twice by petitioner and the negative answer thereto.

How Question Arises.

Respondent requested the District Court to charge the jury:

> "Ladies and gentlemen of the jury: the Plaintiff in bringing this action against the Defendant has injected into this case his innocence. If it can be shown that the Plaintiff in an action for malicious prosecution was in fact guilty of the offense charged, although he has been acquitted in the criminal case, it cannot be claimed by the Plaintiff that there was not probable cause for the prosecution. The Plaintiff must fail in this action whether the Defendant acted from malicious motive or not or whether the Defendant knew at the time of the institution of the criminal proceedings against the Plaintiff all of the facts establishing the Plaintiff's guilt." (p. 19, Appendix.)

As stated by the Court of Appeals in its opinion of November 27, 1964, 338 F. 2d 752:

> "The District Judge declined to give said charge, to which ruling defendant then and there duly excepted." (p. 19, Appendix.)

This exception obviated the necessity of a further exception to the related erroneous statement in the general charge that:

> "In considering the question of probable cause, to which I have directed your attention, you should not

concern yourself with, or consider, whether the Plaintiff was, at the time the complaint was made against him by the Defendant's officer, or as a result of the trial, guilty or innocent. That is not an issue in this case. * * *" (pp. 19-20, Appendix.)

The sole question presented is whether these intertwined errors were prejudicial in view of the jury's answer to written Interrogatory No. 3.

STATEMENT OF CASE.

Sessoms' sketchy statement of facts is understandable because this Court is not required to know the facts in detail in order to examine the single question which Sessoms raises.

ARGUMENT.

I.

Error Admitted by Petitioner.

On page 2 of the Petition for Certiorari, petitioner states that the trial court erroneously instructed the jury that the plaintiff's guilt or innocence was not an issue in the case and erroneously refused a requested instruction that the jury should find for the defendant if it found plaintiff guilty of the crime for which he claims he was maliciously prosecuted.

II.

Decision of Court of Appeals Summarized.

The decision of the Court of Appeals is best stated in its Opinion at pages 26-27 of the Appendix where the Court said:

"* * * Although the Interrogatory No. 3 did instruct the jury to find whether plaintiff had cashed the check twice and the jury made a finding that he did not, the language of the Interrogatory was couched

in quite different terminology from the oral instruction that the guilt or innocence of the plaintiff was not in issue. In addition, the Interrogatory constituted a side reference, rather than an explicit one, to the question. The authorities which we have examined indicate that where there is an erroneous instruction, it should be corrected by a positive statement of the Court that the instruction in question was erroneous and is specifically corrected by the later instruction. We cannot say that this was done by the language of Interrogatory No. 3.

"In our opinion, the defendant could not help but be prejudiced not only by the refusal of the Court to give the requested instruction but also by its positive charge to the contrary."

Upon the application for rehearing, the Court of Appeals adhered to this decision saying:

"* * * The District Judge instructed the jury not to consider the question of guilt of the defendant [sic]. But at the conclusion of the charge he told them that he was submitting to them three interrogatories, each of which would require a written answer. Interrogatory No. 3 required the jury to pass on the guilt or innocence of plaintiff. It is obvious that Interrogatory No. 3 was inconsistent with those portions of the charge that instructed the jury that plaintiff's guilt was not an issue. This inconsistency was confusing and misleading to the jury, and in the opinion of this Court was prejudicial to the defendant."

and

"We have carefully examined the cases cited by plaintiff's counsel that applied the rule that if special findings of the jury show that a party was not injured by an erroneous charge or an erroneous denial of a special charge, the error is harmless. The rule is sound, but in the opinion of this Court, it is not applicable to the facts of this case." (pp. 30 and 31, Appendix.)

III.

Decision of Court of Appeals Correct.

The Court of Appeals correctly determined that under Ohio law Sessoms' guilt was an issue and that the trial court erred in charging the jury not to "concern yourself with, or consider, whether the Plaintiff was guilty or innocent. That is not an issue in this case."

The Court of Appeals also correctly held that it was error to refuse the requested charge presented by respondent.

This left only the issue of prejudice which turned upon whether the submission of Interrogatory No. 3 and the jury's negative answer cured the errors.

The Court of Appeals treated the submission of the interrogatory and the proceedings thereupon as part of the charge. This was correct in view of the provisions of Rule 49(b) that:

> "The Court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, * * *."

The Court gave no explanation or instruction but sent the case to the jury without retracting his statement that Sessoms' guilt was not an issue and that the jury should not concern itself with that aspect of the case.

At best, the jury could not help but be confused. At worst, the jury may have believed that it was required to answer the interrogatory in the negative. It is quite possible that the jury interpreted the Court's statement that it should not concern itself with Sessoms' guilt as the equivalent of saying that that issue had been decided conclusively and favorably to Sessoms in the criminal case.

The Court of Appeals also cited and quoted in its opinion ample authority that the Court may not correct a

clearly erroneous instruction by indirection or inference (pp. 24-26; 30-31, Appendix).

Having been told by the District Court that Sessoms' guilt was not in issue, the jury was in effect told that its answer to Interrogatory No. 3 had become unimportant; that the answer made no difference; and that it could shrug the interrogatory off.

The instruction that Sessoms' guilt was not an issue and that the jury should not concern itself with it, made the interrogatory and its answer surplusage.

IV.

Case Involves No Undecided Question Under Rule 49(b).

Rule 49(b) prescribes the well-known practice with respect to interrogatories. The Court may submit them to the jury and is required to explain them and instruct the jury, as may be necessary, to enable the jury to answer both the interrogatory and to render a general verdict. If the answer to a special interrogatory is inconsistent with the general verdict, the answer to the interrogatory controls and the Court will thereupon enter the required judgment.

Interrogatories are to be submitted only when they are "upon one or more issues of fact the decision of which is necessary to a verdict."

In the instant case the Court instructed the jury that the issue to which Interrogatory No. 3 related was not an issue for the jury's consideration and thereafter submitted Interrogatory No. 3 without any explanation or instruction.

This put the jury in the position of being requested to answer an interrogatory upon a subject which the Court had withdrawn from the jury's consideration.

The Court of Appeals held that this necessarily confused the jury; that it amounted to giving the jury inconsistent and contradictory instructions; that it was impossible for the jury to know which was to be their guide, and also impossible after verdict to ascertain which instruction the jury followed.

This simply amounted to a misinstruction by the Court, for which the Court was reversed, and the decision of the Court of Appeals clearly does not raise any question involving the interpretation or the application of Rule 49(b).

The decision in this case does not represent any change in the law nor will it cause any confusion in the practice when other District Courts employ Rule 49(b).

V.

No Conflict by Courts of Appeals Presented.

No conflict between the courts of appeals is created by the Sixth Circuit's decision in this case and the Ninth Circuit's decision in *Pacific Greyhound Lines v. Zane* (9 Cir., 1947), 160 F. 2d 731.

The *Zane* case involved an attempt to circumvent a release by having it declared void. To succeed it was necessary to prove actual fraud. The Court instructed on constructive fraud, which instruction would not support the verdict. The Ninth Circuit held that the instruction was prejudicial and reversible error. The court then encouraged the use of interrogatories by stating that if they had been utilized in the case before it, and if the jury had indicated that it found actual, as opposed to constructive, fraud, then the error would have been harmless in that case and would not have required reversal. The court did no more than restate the reason for Rule 49(b) of the Federal Rules of Civil Procedure.

The Sixth Circuit in this case accepted the reason for Rule 49(b) Federal Rules of Civil Procedure and recognized that special findings can render an erroneous charge harmless but held the rule inapplicable to this case, in which the jury was confused and misled. How or why the jury arrived at the answer cannot be known.

VI.

The Decision Is in Accordance With Established Law.

Plaintiff has cited but one case in support of his contention that the Sixth Circuit did not follow settled policy in reversing and remanding this case. The factual background presented in *Kanawha and Michigan Railway Co. v. Kerse, Adm.* (1915), 239 U. S. 576, is an excellent example of the situation in which an interrogatory to the jury can cure error. The only error was the refusal to charge on assumption of risk. The jury, not misled by erroneous instructions and not confused by misstatements of law on the point in question, found a fact as they were instructed to do by the court. This fact negated the prejudicial error found in the refusal to give the charge by stating to the court the jury's determination of the issue which would have been presented by the charge and was presented by the interrogatory.

We are in the case at bar confronted with an erroneous refusal to give a requested charge, an erroneous withdrawal of the issue forming the basis of the requested charge and an erroneous presentation of an interrogatory upon an issue which was not necessary to a verdict according to the court's general charge.

In each case where an error could be rendered harmless by an answer to an interrogatory, the court must decide whether the answer is such as clearly to exclude every reasonable conclusion that would authorize the finding

that it did not correct the error. What the jury intended by its answer to the interrogatory in this case is pure speculation and the answer cannot be relied upon to cure grossly prejudicial error on the part of the trial court.

Respectfully submitted,

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June 23, 1965.